No. 12878

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, JR.,
*Appellant,*

*vs.*

UNITED STATES OF AMERICA,
*Appellee.*

No. 12878

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

HARRY L. OLSON,
FREDERICK C. PALMER,
JOHN WM. McARDLE.
302 Miller Building
Yakima, Washington
*Attorneys for Appellant.*

No. 12878

IN THE

# United States Circuit Court of Appeals

## FOR THE NINTH CIRCUIT

THOMAS T. CHAMALES, JR.,
*Appellant,*

*vs.*

UNITED STATES OF AMERICA,
*Appellee.*

No. 12878

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

HARRY L. OLSON,
FREDERICK C. PALMER,
JOHN WM. McARDLE.
302 Miller Building
Yakima, Washington
*Attorneys for Appellant.*

## SUBJECT INDEX



## TABLE OF CASES

Page

TEXTS AND STATUTES

## STATEMENT REGARDING JURISDICTION

This action was commenced by the United States attorney filing an information and a waiver of hearing before a grand jury by the appellant. Shortly thereafter an amended information was filed charging appellant on two counts of violating the White Slave Traffic Act, 18 U.S.C.A. 2421, (R. 3, 4) 62 STAT. 812 as amended in 63 STAT. 96. The District Court has jurisdiction under 18 U.S.C.A. 3231.

Appellant was acquitted on count one, but found guilty as charged on count two of the amended information (R. 7), sentenced and the judgment and commitment entered by the District Court (R. 12, 13).

The case comes within the usual appellant jurisdiction of the United States Court of Appeals upon appeal from a final decision of the District Court of the United States 28 U.S.C.A. 1291. The judgment of the District Court was entered on January 22, 1951 and notice of appeal was filed on January 22, 1951 (R. 13, 14).

## STATEMENT OF THE CASE

The appellant was charged as follows in the amended information:

"AMENDED INFORMATION

VIO: Sec. 2421, Title 18, U.S.C.

White Slave Traffic Act

The United States Attorney charges:

(All numerical references herein, unless otherwise indicated, are to the pages of the printed Transcript of Record. All italics are supplied by counsel).

Count I.

That Thomas T. Chamales, Jr., on or about the 10th day of March, 1949, did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Count II.

That Thomas T. Chamales, Jr., on or about the 14th day of August, 1949 did transport and cause to be transported, and aid and assist in transporting Elaine Elliot from Chicago, Illinois, to Yakima, in the Southern Division of the Eastern District of Washington, for the purpose of prostitution, debauchery and other immoral purposes.

Dated this 25th day of October, 1950.

/S/ HARVEY ERICKSON
United States Attorney

/S/ LLOYD L. WIEHL,
Assistant U. S. Attorney.

(Endorsed): Filed Oct. 25, 1950."

To this amended information the appellant plead not guilty on January 9, 1951 and the case came on for trial on said date before the United States District Court sitting in Spokane with a jury. The appellant was acquitted as set forth above, upon the first count and convicted upon count two.

The appellant, who was twenty-six years old at the time of the trial, was born in Chicago, Illinois and received his secondary education at St. John's Military School in Delafield, Wisconsin, graduating in the year 1942 at the age of seventeen. As soon as he reached eighteen, he entered the Army as a private and shortly thereafter qualified

to attend officer's candidate school at Fort Benning, Georgia. After graduating from officer's candidate school, he was commissioned a second lieutenant in the infantry and for approximately three and one half to four months thereafter instructed new recruits at Camp Wheeler in Macon, Georgia. After this tour of duty of instructing, appellant, at his own request, was shipped overseas to North Africa and after a short period of time in North Africa, he was ordered on to India where he volunteered for an organization which became known during the war as Merrill's Marauders. Merrill's Marauders engaged primarily in long range penetration behind the enemy lines in the jungle where they would establish road blocks and cut enemy lines of communication thereafter dispersing into small groups and hiding in the hills (R. 211). While engaged in this duty, appellant spent six months in the Burmese Jungle in almost daily combat. He received shrapnel wounds in both the feet and his head and also suffered a severe concussion, these injuries being received from a Japanese-thrown grenade. When the appellant came out of Burma, he weighed 98 pounds, his normal weight being in excess of 200. Appellant was hospitalized and after a rest leave following his discharge from the hospital, he again volunteered for guerilla duty in Burma with the Office of Strategic Services (R. 214) and was parachuted into Burma at a small town somewhat north of Lashio. Appellant, at this time, was a captain and spent approximately two years in Burma with the Office of Strategic Services, fifteen months being in

combat (R. 216). He contracted malaria and amoebic dysentery while in Burma and was engaged in continuous combat without relief for as long as eight months at a time. He was discharged from the Army in December, 1945 and was suffering from violent headaches (R. 217). At first these headaches were about two months apart and then they became approximately six weeks apart. He was also under emotional and nervous strain, which periods of tension would last anywhere from two or three days to a week. He received medical attention for his headaches after his discharge from the Army.

At this juncture the United States attorney objected to further evidence on appellants medical treatment and the court ruled that it was immaterial, sustaining the Government's objection (R. 220).

In January, 1947 appellant's father purchased the Commercial Hotel which was Yakima's leading hotel (R. 201), and appellant assisted in the operation and management of the same.

In the early part of 1949 appellant received a call from his father, his parents then living in Elgin, Illinois, which required him to make a trip to Chicago in March of that year. When he arrived in Chicago, he had lunch with a friend, one Martin McDonald, and in the luncheon conversation, the name of Elaine Elliot was brought up and Mr. McDonald arranged a meeting between appellant and Elaine Elliot (R. 58, 59). At the first meeting of appellant and

Mrs. Elliot she fell in love with him at first sight according to her testimony (R. 37). He took her out four or five times during a period of two or three weeks to various restaurants for dinner and also took her to a family dinner at the home of a friend of his, Dick Sullivan, in Chicago (R. 73) and to the home of appellant's sister and brother-in-law for dinner. It is undisputed that appellant treated Mrs. Elliot with the utmost courtesy, politeness and propriety during all the time that they were together in Chicago (R. 74). While the two of them were having dinner at a restaurant called the "Yar" they discussed Mrs. Elliot's coming out to Washington to work in the Commercial Hotel as a hostess or secretary for the appellant (R. 77). It was her suggestion that she might be of some help (R. 224). After about two weeks Mrs. Elliot decided to come back to Yakima with the appellant and her mother came down to the train with them to see them off (R. 78). On the trip out to Yakima, they shared the same compartment.

Upon arriving in Yakima appellant and Mrs. Elliot shared his suite in the Hotel Commercial for about a week and thereafter she moved to another room in the hotel where she stayed the rest of the visit in Yakima (R. 855). They had various arguments shortly after they arrived in Yakima and the quarreling continued for the next two or three week period that she remained out West and finally reached the point where it was decided that she was to return to Chicago (R. 86). She did not commence working in the hotel in either of the suggested jobs that had been discussed

due to both the constant quarreling and the further fact that the job of hostess in the dining room did not become available. Appellant furnished Mrs. Elliot with transportation back to Chicago, her ticket being delivered by one of his employees (R. 87).

Upon Mrs. Elliot's arrival in Chicago, she immediately called the appellant telling him how much she missed him and that she loved him (R. 88). During the months of April, May, June and July and the first part of August, 1949 while Mrs. Elliot was in Chicago she called the appellant many times from Chicago, her estimate being that she might have tried to reach him twenty times. The calls were collect and appellant was not often available as actually only about four or five calls were accepted (R. 89). Appellant in his testimony stated that some days the phone calls would run as high as fifteen or eighteen calls in one day and that he would persistently refuse them although he did accept some calls (R. 230). The frequency of the phone calls was also substantiated by the testimony of Clay Carroll, called on behalf of the appellant who at the time of the trial was a disinterested witness. Mr. Carroll (R. 205, 206) stated that collect calls from Mrs. Elliot would come in repeatedly during one day, that appellant would refuse to accept them stating: "Tell them I am out or can't be reached." That there would then be a lull for a period of time and then quite a few calls would come in again. That the majority of times appellant informed him that he was out and that he would not accept the calls. Mr. Carroll

further testified that he had a call from the Northwest Airlines in Chicago requesting that the hotel "o. k." Mrs. Elliot's transportation from Chicago to Yakima and that he give the Northwest Airlines Company a check at their Yakima office and that the Chicago office of the Northwest Airlines would then put Mrs. Elliot on the plane; that he had no way to authorize this and told them absolutely no (R. 205). In addition to the many phone calls, Mrs. Elliot wrote several letters and sent a couple of nasty telegrams according to her admission on cross examination (R. 91). Exhibit No. 4 was identified by Mrs. Elliot as one of the letters that she wrote appellant during the time that she was in Chicago between the first and second trips to Yakima. This exhibit indicates Mrs. Elliot's method of pursuing the appellant by her own written statement in which she said: "I have pursued you shamefully" (R. 99). During the first part of August 1949 there were additional phone calls with reference to Mrs. Elliot's coming West again. She definitely wanted to come according to her admission on cross examination (R. 94). She was asked by appellant if she was willing to work and she stated that she was. She further agreed to stay for good according to her testimony. Appellant states that he brought her out to Yakima the second time to convince her of the fact that everything was over between them. That further his mother and father were living at the hotel during this period of the phone calls and that they were very very upset about Mrs. Elliot's tremendous persistency and that something had to be done, par-

ticularly as far as the family was concerned, about getting her to stop (R. 232). He proposed to tell Mrs. Elliot this personally and that was the reason for his bringing her out (R. 232). Appellant did forward the money for Mrs. Elliot's plane ticket from Chicago to Seattle, the money being sent to her room mate, Marge Mahoney in the amount of $125.00. Upon Mrs. Elliot's arrival in Seattle on August 14, 1949 after first going to the Olympic and waiting for appellant, she went to the Earl Hotel where she registered and took a room (R. 102). Appellant met her at this hotel and told her, according to Mrs. Elliot's testimony, that he was going to put her in a joint (R. 49). After spending the night together, the following morning according to Mrs. Elliot's testimony again, appellant told her that by a joint he meant a house of prostitution (R .50). This was categorically denied by appellant (R. 234, 239). Mrs. Elliot testified that she couldn't consider this suggestion and would have to leave immediately and further that appellant then changed and said "Oh forget about it" (R. 51).

The following afternoon appellant, one Tex Reed and Mrs. Elliot drove to Yakima picking up Mrs. Reed at Cle Elum. Mrs. Elliot stayed in the Commercial Hotel that night and the next day appellant took her to the Rest Haven Motel where again the subject of her going into a house of prostitution was discussed according to Mrs. Elliot but denied by appellant (R. 239). After staying together over night at the Rest Haven Motel, they returned to Seattle with R. A. Sullivan, a business associate of appellant's, and

Mrs. Elliot was registered at the Wilhard Hotel (R. 248). Appellant stayed at the Caledonia Hotel (R. 56). They parted company shortly thereafter, appellant returning to Yakima and Mrs. Elliot returning to Chicago. Appellant testified (R. 238) that when he left Mrs. Elliot in Seattle, as they were parting, she said she was going to get even with him in one way or another.

In addition to the above facts, the testimony of John W. Worsham (R. 132) a Federal Bureau of Investigation agent, was elicited by the Government covering a conversation between the witness and appellant. This testimony was admitted over appellant's objection that the alleged admissions were secured prior to appellant's appearance before a United States Court Commissioner and formal charging (R. 133). At the meeting which was on March 6, 1950, in addition to appellant and Mr. Worsham, there was present Special Agent Eugene P. Clark of the F. B. I. Concerning the first trip out to Yakima of Mrs. Elliot, the testimony of the alleged conversation is not materially at variance with the facts heretofore set forth. With reference to the second trip, the witness stated that on the way from Seattle to Yakima, appellant, Chamales. stated that Mrs. Reed was picked up in Cle Elum, Washington at a house of prostitution. This was categorically denied as not the fact by the appellant (R. 245) as he stated that she was picked up at a restaurant in Cle Elum.

The testimony of Betty DesCorreau (R. 163) another

Government witness covered certain conversations between witness and the appellant upon occasions when she was out on some dates with appellant the two days prior to Mrs. Elliot's arriving by plane on August 14, 1949. The appellant, according to this witness stated that he was a pimp, that he had a few girls working for him, that a girl was coming in from California to work for him. Also that pimps treat these women nice before they break them into the rackets. That two or three days after the Sunday appellant stated the girl was coming in from California, he drove up to her apartment and told her he couldn't take her to Yakima as he had promised. That the girl from California was with Tex Reed and appellant and they had to go to Yakima. The witness further testified that the girl in the car was Elaine Elliot. Appellant categorically denied the alleged conversations (R. 240). Upon appellant's direct examination appellant further stated that Miss DesCorreau attempted to borrow $100.00 from him during the latter part of August or the first part of September, 1949 but that he would not loan her the money. Miss DesCorreau then wrote him a note (R. 243) which in substance state "I thought you were a pretty nice guy until you wouldn't lend me the money and now I don't think so any more and I am going to do whatever I can to degrade you and get even with you for not giving me the money." Miss DesCorreau on cross examination (R. 185) admitted asking appellant for a loan and further that he did not give it to her. She also admitted writing a note (R. 186) but stated that it contained

a rebuke to appellant for not keeping his promises and that she was further not going to keep quiet about what she knew as far as telling her Yakima friends was concerned.

In addition to the evidentiary questions involved in the admission of the testimony of the witness, Worsham, concerning appellant's admissions and the excluding of testimony offered by the appellant as to his need for psychiatric and other medical treatment heretofore discussed on page 4 and 9 of this brief, several questions with reference to the rejection of certain testimony in the cross examination of Elaine Elliot arise. These concern the court's refusal to permit the use of identifications 5, 6 and 7 for the purpose of showing the state of love the witness, Elaine Elliot, professed to be in with reference to her brother-in-law, Bobbie Elliot, a few months before she met the appellant (R. 109, 110, 111, 112); also that the court in said cross examination refused to receive in evidence appellant's identifications 5, 6, 7, 9 and 10 for the purpose of affecting the credibility of Elaine Elliot and also showing her moral delinquency (R. 117) also the rejection of appellant's identifications 5, 6, and 7 which would show that the witness, Eliane Elliot, whose credibility was under attack, lied under oath in her previous divorce proceeding with reference to the nature of a trip taken with her brother-in-law, Bobbie Elliot (R. 115).

In the cross examination of the appellant by the United

States attorney, the court, over appellant's objection, permitted inquiry into the identity of one Tex Reed (R. 252, 253), it being the position of the appellant that this was entirely a collateral matter and had nothing whatsoever to do with guilt or innocence of appellant but was, in effect, an attempt to use a technique of "guilt by association."

The general questions of error in denying appellant's motion for acquittal both at the close of the Government's case and the closing of all the evidence, error in not instructing the jury as proposed, and error in permitting the United States attorney to read the testimony of a Government witness, Betty DesCorreau, in his argument to the jury, (R. 256) were raised by the appellant at the proper times throughout the trial and will be more fully discussed hereafter.

## SPECIFICATION OF ERRORS

The District Court erred:

1. In denying appellant's motions for judgment of acquittal made at the close of the evidence offered by the Government (R. 190).

2. In denying appellant's motion for acquittal made at the close of all the evidence (R. 254).

3. In unduly restricting the cross examination of Elaine Elliot in the following particulars:

(a) Appellant should have been permitted to use

identifications 5, 6, and 7 being letters written by the witness, Elaine Elliot, for the purpose of proving that said witness was, a few months before meeting the appellant, Thomas T. Chamales, Jr., in such a state of love with her then brother-in-law, Bobbie Elliot, that her testimony that she was in love with the appellant at first sight was false (R. 109, 110, 111, 112), the substance of said identifications is as follows: Identification 5 is a letter from Mrs. Elaine Elliot to Mr. and Mrs. A. J. Ollendorf, her grandparents, with envelope dated September 5, 1948 post marked Chicago, Illinois in which letter Mrs. Elliot discusses how everyone misunderstands her and how overwhelming her intensity of feeling is for her brother-in-law, Bobbie Elliot, and how she hopes that he will take her with him wherever he goes. Identification 6 is a letter from Mrs. Elaine Elliot to her mother-in-law, Mrs. J. W. Eskridge, dated September 16, 1948 and post marked Tulsa, Oklahoma on the envelope, in which she again told of her great love for Bobbie Elliot and how she left Chicago with him. Identification 7 is a letter from Mrs. Elaine Elliot to Mrs. A. M. Kimbrough, her former husband's aunt dated October 7, 1948 and post marked Pine Bluff, Arkansas in which, among other things, Mrs. Elliot discusses the fact that she and Bobbie Elliot are having a tough time financially. That he is going to help her get a divorce so that they can get married and "live like decent people once more."

(b) That identifications 5, 6, 7, 9 and 10 should have been admitted for the purpose of effecting or testing the

credibility of the witness, Elaine Elliot, and for the purpose of showing moral delinquency upon the part of Elaine Elliot affecting her credibility (R. 114, 115, 116, 117). Identification 9 is a registration at the Sycamore Court at Little Rock, Arkansas under date of October 19, 1948 during a trip made by the witness, Elaine Elliot, and Bobbie Elliot, the registration being in the name of "Mr. and Mrs. B. Elliot." Identification 10 is a guest registration dated September 15, 1948 during the said trip in question taken by the witness, Elaine Elliot and Bobbie Elliot from the Anchor Court in Laurel, Mississippi, the registration being as follows: Mr. and Mrs. R. Elliot.

(c) Appellant should have been permitted to introduce identifications 5, 6, and 7 above discussed and also permitted in connection therewith to show in the cross examination of the witness, Elaine Elliot, that the said Elaine Elliot had lied under oath in her previous divorce proceeding in Chicago between herself and Wright Elliot. In this divorce proceeding, in which the custody of Mrs. Elliot's child was an issue, she swore under oath in her divorce pleadings that a trip she took in the early fall of 1949 with her brother-in-law, Bobbie Elliot, was all a conspiracy between her husband, Wright Elliot, and her brother-in-law to discredit her under circumstances that might indicate adultery and that on the trip she conducted herself in a respectable manner. Identifications 5, 6 and 7 above summarized prove that the witness, Elaine Elliot, was lying in the statements made in her verified divorce pleadings as

these letters written by the witness clearly indicate that she was madly in love with Bobbie Elliot and there was obviously no conspiracy involved and that they were obviously living together (R. 115, 116).

4. In permitting the United States attorney in cross examination of the appellant to ask and to require the appellant to answer questions as to the identity of the witness, Tex Reed (R. 252, 253). In this testimony the United States attorney asked the appellant whether or not he told Worsham of the F. B. I. that Tex Reed was a high class gambler and pimp. This evidence obviously concerned a collateral matter concerning the identity of Tex Reed and in effect was an attempt to cast discredit upon the appellant by the device of "guilt by association."

5. In permitting the witness, Worsham, to testify over appellant's objections as to admissions claimed to have been made by the appellant (R 133). These admissions arose out of a conference on March 6, 1950 when appellant was taken to the F. B. I. Office in Yakima and interrogated by the witness, Worsham, and Eugene P. Clark, also a special agent of the F. B. I. concerning his acquaintanceship with Mrs. Elliot. The admitted testimony briefly summarized the appellant's travel from Chicago to Yakima, Washington in the same compartment with Mrs. Elliot on the Northern Pacific Railroad, her stay at the Commercial Hotel for three weeks, the fact that they had sexual relations during the said period, the appellant's sending her back to Chicago

in the spring of 1949, the phone calls, made by Mrs. Elliot to the appellant, her second trip out to the Northwest using money that he sent her, the trip from Seattle to Yakima and their being together at the Rest Haven Motel in Yakima, the appellant's registration of Mrs. Elliot at the Wilhard Hotel in Seattle under the name of Elaine Palmer. It is appellant's contention that this testimony was not admissible due to the fact that appellant had not been charged with an offense or appeared before a United States Court Commissioner at the time of the alleged admissions.

6. In excluding the testimony offered by the appellant as to his need of psychiatric and other medical treatment and as to the history of the medical and psychiatric treatment received by the appellant subsequent to his discharge from military service and up to the date of the trial (R. 218, 219, 220). The offered testimony would have shown the appellant's emotional instability during the time the alleged crime was committed and should have been before the jury to assist them in the determination of appellant's guilt or innocence.

7. In refusing to submit appellant's proposed instructions No. 9, 11 and 16 (R. 5, 6, and 7). The refused instructions are as follows:

"Proposed Instruction No. 9

You are instructed that even though you find from the evidence beyond a reasonable doubt that the defendant Thomas T. Chamales, Jr., had the intention that he would put the woman Elaine Elliot in the business of prostitution or

have immoral sexual relations with her or allow or arrange for someone else to have immoral sexual relations with her but that he did not form such intention until reaching the State of Washington, then you must return a verdict of 'Not Guilty'."

The above instruction should have been given for the reason that from the testimony the jury could well have found that even though the appellant was guilty of an intention to place Mrs. Elliot in a house of prostitution that such intention was not formed until after her arrival in the State of Washington (R. 277).

"Proposed Instruction No. 11

You are instructed that in order for you to find that the intent of the defendant, Thomas T. Chamales, Jr., was for himself to have immoral sexual relations with the woman, Elaine Elliot, you must find from the evidence beyond any reasonable doubt that the defendant formed a plan in his mind to have such immoral sexual relations at the time he transported or caused to be transported this woman across state lines, if you find that he did so transport or cause her to be transported, and you must find that it was his actual plan, seriously made as distinguished from a mere hope or desire or mere wishful thinking that such immoral relations could be accomplished if the woman was across the state border, and if you find that the defendant's intent was a mere hope or desire or anything less than an actual, seriously made plan to have immoral sexual relations with the woman, Elaine Elliot, then you must return a verdict of 'Not Guilty'."

The above instruction should have been given because it explains to the jury the necessity that the appellant have a planned intent at the time the alleged transportation was begun. The statute under which the appellant was charged provides specifically that the transportation be performed

for the purposes mentioned in the statute, and if the jury found that the transportation was not under a plan for that purpose the appellant should be found not guilty even though the jury might find that the appellant had a wish or desire or some wishful thinking about immoral relations. This instruction is just as applicable to the second count because there was evidence in the second count as to sexual relations after Mrs. Elliot reached Seattle, Washington on her second trip (R. 279).

"Proposed Instruction No. 16

You are instructed that if you find from the evidence presented to you during this trial that the defendant transported or caused to be transported the woman Elaine Elliot but that he did so with the intent that he was to employ her in his hotel, with which he was connected in a legitimate and honest position, then you must return a verdict of 'Not Guilty.' Or if you find that the defendant's intent was some other lawful purpose, then you must also return a verdict of 'Not Guilty.' Or even though you find beyond a reasonable doubt that the defendant intended that the transportation of Elaine Elliot was for immoral purposes but that such intent, if any, was secondary or a lessor intention or intentions and that some lawful or legitimate purpose was the defendant's main or primary purpose, then you must also return a verdict of 'Not Guilty'."

This instruction should have been given for the reason that it covers the point that if the jury found the transportation of Mrs. Elliot was with the intention that she was to be employed or that the appellant's intention was to "tell her off" to her face so that she would leave him alone in the future, in neither event would the appellant have been guilty of the crime charged in the second count. Without

this instruction having been given, this phase of the case was not properly before the jury (R. 279).

8. In refusing to admit appellant's identifications numbers 2, 3, and 8 which identifications were the pleadings of the witness, Elaine Elliot's divorce proceedings and showed her sworn statements therein relating to the alleged conspiracy between her husband, Wright Elliot, and Bobbie Elliot concerning her trip with the said Bobbie Elliot and also her sworn statement that she conducted herself as a respectable woman on said trip.

9. In permitting the United States Attorney in his closing argument to the jury to read in question and answer form the testimony of the Government witness, Betty DesCorreau (R. 256, 257, 258), it being appellant's contention that this in effect permitted the witness, Betty DesCorerau, to testify twice and unduly emphasized said witness' testimony and such action on the part of the United States attorney was highly prejudicial to the appellant.

10. In denying defendant's motion for a new trial.

## ARGUMENT OF THE CASE

### SUMMARY

1. The court erred in denying appellant's motion for an acquittal at the close of the Government's case and at the close of all the evidence due to the insufficiency of the evidence presented.

2. The cross examination of Mrs. Elaine Elliot was

unduly restricted and such restriction was prejudicial to the appellant's defense preventing a thorough testing of the credibility of this witness which was a key point in the case. The refusal to admit identifications 2, 3, 5, 6, 7, 8, 9 and 10 augmented this prejudice.

3. The cross examination of Appellant as to the identity of one Tex Reed, the said Reed being not even called as a witness in the case, also was prejudicial to the appellant.

4. It was error to admit the alleged admissions of the appellant through the testimony of the witness, Worsham.

5. It was error to reject the appellant's testimony as to his need of psychiatric and other medical treatment.

6. The court erred in refusing to charge the jury as set forth in appellant's requested instructions 9, 11 and 16.

7. The use of the testimony of the witness, Betty DesCorreau, in question and answer form by the United States attorney in his closing argument to the jury unduly emphasized this testimony to the appellant's prejudice.

8. A new trial should have been granted by the trial court.

## I.

## APPELLANT'S MOTION FOR ACQUITTAL SHOULD HAVE BEEN GRANTED

It is appellant's contention that there was no testimony whatsoever in the case proving a plan to be participated in

or acted upon jointly by the appellant and Mrs. Elliot to violate the statute in question. Likewise, there is no credible evidence which would prove or tend to prove that the appellant had any plan from which the jury could infer an intent to violate the statute at least prior to Mrs. Elliot's entering the State of Washington. Her testimony as to both trips was that she was coming out to work. Appellant's testimony as to the first trip certainly indicates that he had in mind her working at the hotel (R. 226). His testimony as to the purpose of the second trip was to the effect that he wished to explain personally to her that the affair between them was finished and that she had to stop pursuing him (R. 232).

The primary evidence brought forth by the Government to establish appellant's intent was by the witness, Betty DesCorreau. It is submitted that her testimony was obviously so biased and so fantastic that it was not worthy of belief. The statements that she attributes to the appellant (R. 163) are absolutely uncorroborated although her testimony of the appellant stopping at the witness' apartment, and allowing her to see the woman in the car whom she identified at the trial as Mrs. Elliot (R. 171), could have been easily corroborated. It is difficult to understand why the matter of this stop was not corroborated in the direct examination of Mrs. Elliot, because a mere reading of her testimony evidences a most remarkable memory, particularly on her direct examination of names, dates, places and what happened. It would seem that if the stop on the way

from Seattle to Yakima in front of Miss DesCorreau's apartment was actually made, that Mrs. Elliot would have remembered the stop.

It is likewise impossible to understand why the witness, Carlyle (Tex) Reed who was under subpoena by the Government and present at the trial (R. 22) and who was the only other person with testimonial knowledge concerning the alleged stop, was not interrogated upon the government's case-in-chief as to this point. The failure of these witnesses to corroborate Miss DesCorreau's testimony, linking up Mrs. Elliot to the previous conversations she had with the appellant, leads only to one conclusion, namely that they could not corroborate Miss DesCorreau's statement because the stop simply was not made. This testimony was obviously manufactured for the purpose of "getting even" with the appellant.

The vital necessity of proving beyond a reasonable doubt the intention of transporting a woman for a purpose outlawed by the statute has been enunciated many times by our courts. The failure to prove by the degree of required proof, this intent, is our principal contention on this point.

In MORTENSEN vs, U. S., 88 LAW ED. 1331; 322 U. S. 369, our Supreme Court held that a conviction of the crime of knowingly transporting women in interstate commerce for immoral purposes and with the intent and purpose to induce, entice or compel a woman so transported to become a

prostitute is not violated by evidence that defendants, a man and wife who operated a house of prostitution, were accompanied by two of the prostitutes on a pleasure trip across state lines and that upon their return to the house of prostitution, such prostitutes resumed the exercise of their vocation. The court in discussing the matter of intent stated:

> "An intention that the women or girls shall engage in the conduct outlawed by § 2 must be found to exist before the conclusion of the interstate journey and must be the dominant motive of such interstate movement. And the transportation must be designed to bring about such result. Without that necessary intention and motivation, immoral conduct during or following the journey is insufficient to subject the transporter to the penalties of the Act."

In YODER vs. U. S. 80 FED. (2d) 665 (CCA 10) it was held that, under the statute making it an offense to transport a female in interstate commerce for immoral purposes, the prospect of sexual relations must have some relation to and be one of the reasons or purposes of the trip, but if the sole purpose of the trip is legitimate, purely incidental intent to have intercourse is not a federal offense. In discussing this point, the court stated at page 672:

> "While 'intent and purpose' are used synonymously in the second clause of this statute, and many courts have so used them in these cases, yet the authorities cited all hold, as we do, that the prospect of sexual relations must have some relation to, and be one of the reasons or purposes of the trip. There may, of course, be two or more reasons or purposes for one trip, *Carey v. United States* (CCA 8) 265 F. 515, but if the sole purpose of

the trip is legitimate, a purely incidental intent to have intercourse is not a federal offense. If the jury believed the witnesses for the defendant here, there was no crime. And their testimony is strongly buttressed by the admitted fact that there was no necessity to go to Chicago, or anywhere else, for an immoral purpose."

In U. S. vs. GRACE, 73 Fed. (2d) 294 (CCA 2) it was held that if the interstate journey was planned with no immoral purpose at the time, no crime was committed since immoral relations standing alone unconnected with interstate commerce do not violate the statute. The court stated at page 295:

"The statute makes the intent and purpose an element of the crime, and, if the journey was planned with no immoral purpose at the time, no crime was committed no matter what may have occurred thereafter. It is the immoral purpose which renders such interstate commerce criminal. The immoral relationship, standing alone, unconnected with interstate commerce, does not violate the act. *Drossos v. United States* (CCA) 16 F. (2d) 833; *Sloan v. United States* (CCA) 287 F. 91; *Fisher v. United States* (CCA) 266 F. 667; *Gillette v. United States* (CCA) 236 F. 215. Inducing a girl to go from one state to another with any other purpose, except the formed intent at the outset, is insufficient to constitute a violation of the statute. *Alpert v. United States,* supra; *Welsch v. United States* (CCA) 220 F. 764; *Sloan v. United States,* supra."

In ALPERT vs. U. S. 12 F. (2d) 352 (CCA 2) it was held that intent is essential to violation of the White Slave Traffic Act of June 25, 1910 and the fact that the journey in question from one state to another is followed by illicit intercourse does not result in a violation of that Act where the journey was made for wholly different reasons. In

discussing the matter of intent the court stated at page 354:

> "There is no evidence of any arrangement between the couple or understanding between them for illicit intercourse after going to Pennsylvania. The fact that a journey from one state to another is followed by such intercourse, where the journey was not for that purpose, but wholly for other reasons, cannot be regarded as a violation of that act. *United States v. Fisher* (CCA) 266 F. 670. To justify conviction, there should be convincing evidence of the intention to transport the woman for immoral purposes, and that it was formed before the woman reached the state to which she was being transported. If the intention referred to did not exist before the woman reached the state to which she was being transported, but was formed after reaching the state in which the illicit relationship is had, conviction under the act cannot be had."

In JOHNSON v. U. S. 215 Fed. 679 (CCA 7) it was held that although the evidence was sufficient to sustain a conviction of the accused for causing a woman to be transported in interstate commerce for the purpose of having sexual intercourse with her, it was, however, insufficient to sustain counts for causing the same woman to be transported for purposes of prostitution. The facts in this case indicated that the defendant had supplied money to allow the woman to open and conduct a brothel in Chicago after having paid her transportation to Chicago from Pittsburgh. In discussing the intent shown in view of the proof the court stated at page 682:

> "But a different situation affects the prostitution counts. Telephone and telegraph messages contained no suggestion of prostitution. The only fact is that several days after the girl's arrival in Chicago defendant supplied

> the money to enable her to open and conduct a brothel. This fact might lead to a suspicion that defendant when providing transportation had the intent to aid her subsequently in her profession. But criminal convictions cannot be allowed to rest on suspicion. And there were no supplementary facts like those that support the sexual intercourse counts—no proof that defendant had ever been conected with or interested in brothels, or that prior to the act in Chicago he had ever aided this or any other girl to engage in prostitution."

It is submitted that the Johnson case is certainly much stronger than the case at bar as we have no credible evidence in the instant case that the appellant was connected with or interested in brothels. There is also nothing in the evidence relating to the second count which would indicate any planned intent or purpose upon the part of the appellant that he was bringing Mrs. Elliot out from Chicago to Seattle for the purpose of having sexual relations with her. The fact that he did have sexual relations after she reached Seattle, we submit is and was purely incidental to the main purpose of the trip which as we have heretofore stated, was to convince her that she and the appellant were through.

In FISHER vs. U. S. 266 F. 667 (CCA 4) the court stated at page 670:

> "That is to say, the interstate transports denounced by the act must have for its object, or by a means of effecting or at least of facilitating, the sexual intercourse of the parties. But the mere fact that a journey from one state to another is followed by such intercourse, when the journey was not for that purpose, but wholly for other reasons, to which intercourse was

not related, cannot be regarded as a violation of the statute."

## II.

## THE CROSS EXAMINATION OF MRS. ELLIOT WAS PREJUDICIALLY RESTRICTED

It is appellant's contention that the cross examination of the Government's principal witness, Mrs. Elaine Elliot was unduly restricted and that such restriction was prejudicial and prevented the appellant from having a fair trial. The entire case actually hinged upon the credibility of the two principals involved in these transactions, namely, Mrs. Elaine Elliot, the prosecuting witness, and the appellant, Tom Chamales, Jr. The casting of the strong light of a searching cross examination upon Mrs. Elliot's testimony was prevented and the jury was not enabled to view her testimony in its proper perspective having been tested by this fundamental right of every accused. The restriction of the cross examination of Mrs. Elliot denied to the appellant a substantial right and withdrew one of the very fundamental safeguards essential to a fair trial. Her credibility was not tested and without such a test the jury could not fairly appraise the weight of her testimony.

It is appellant's contention that in view of Mrs. Elliot's statement that she fell in love with the appellant at first sight (R. 37, 66) that he should have been allowed upon the cross examination of this witness to interrogate her at length regarding an extended affair she had with one Bobbie

Elliot in the fall of 1948 and approximately five to six months prior to her meeting the appellant. The purpose of this phase of the cross examination was to place before the jury the fact that this woman had only a few short months ago professed great love for one Bobbie Elliot, her then husband's brother, had taken a cross-country trip with him, unlawfully cohabiting with him in various auto courts in Arkansas and Mississippi, particularly, and it was thus at least doubtful that her statement that she fell in love with the appellant at first sight was actually the truth. Appellant had the right to raise this point, it is submitted, by offering in evidence identifications 5, 6 and 7, being the letters written by the witness professing her great love for Bobbie Elliot and her intensity of feeling for him, and also examining the witness concerning the contents of these letters. This point would certainly tend to rebut Mrs. Elliot's testimony given in her direct examination. The identifications 9 and 10 being the motel registration of Mr. and Mrs. Bobbie Elliot, in the case of identification 9, at the Sycamore Court, Little Rock, Arkansas and the registry of Mr. and Mrs. R. Elliot at the Anchor Court in Laurel, Mississippi, were, of course, also material and relevant upon this point tending to prove her extreme state of love for Bobbie Elliot. The offer of proof upon these points and the offer of the identifications in evidence was made at the proper time (R. 11, 112, 114).

Another phase of the undue restriction of the cross examination of the witness was the refusal of the court to

permit the cross examination of the witness, Mrs. Elliot and the introduction of the identifications 5, 6, 7, 9 and 10 which would very clearly have shown the moral delinquency of the witness in view of the fact of her unlawful cohabitation with Bobbie Elliot and the jury was entitled to consider her evidence in view of this moral delinquency which was clearly subject to being proven. The background of every witness is subject to searching, particularly for moral delinquency, in order that the jury may properly assess the credibility of the witness and properly weigh the testimony in question.

The cross examination of this witness was further unduly restricted by reason of the trial court's refusal to allow the appellant to question her concerning obvious false statements sworn to in her divorce pleadings. Identifications 2, 3 and 8 contained the entire pleadings in Mrs. Elliot's divorce case with her husband, Wright Elliot, and in her counter complaint, being identification 8, this witness swore under oath that while in the company of Bobbie Elliot she conducted herself in a respectable manner and that her trip, above discussed, with Bobbie Elliot was all a conspiracy upon the part of her husband, Wright Elliot and the said brother-in-law, Bobbie Elliot in order to manufacture adultery charges. The identifications 5, 6 and 7 heretofore discussed were letters written by the witness, Mrs. Elliot, to her grandparents, Mr. and Mrs. A. J. Ollendorf, her mother, Mrs. J. W .Eskridge, and to a Mrs. A. M. Kimbrough. These letters indicate beyond a doubt that Mrs.

Elliot and Bobbie Elliot were not conducting themselves in a respectable manner and in identification 7, she makes the statement that Bobbie Elliot was going to help her get a divorce so that they could get married and "live like decent people once more." If the appellant had been permitted to cross examine this witness upon her sworn statements in the divorce counter-suit and the statements contained in her letters, it is entirely possible that the witness would have admitted the fact that she swore to the statement in the divorce counter-suit and also wrote the matter contained in the letters in question. The jury would then have had before them an admission that Mrs. Elliot had previously sworn falsely and her testimony in the case at bar would have been weighed by the jury with this fact in mind. As the matter now stands, the appellant was refused the right to even go into this false swearing. The offer of this testimony and identifications was properly made (R. 115, 116, 117 and 118).

In TLA-KOO-YEL-LEE vs. U. S. 42 Law. Ed. 166, 167 U. S. 274, it was held that a woman who has testified for the prosecution to the fact that a murder was committed by the defendant and by her husband, who was also indicted therefor, may be asked on cross examination whether since her husband's arrest she has not been living with another witness for the prosecution, and whether they had not agreed to live together if the husband is convicted and they get clear. Specifically, the question asked in this case referred to who the witness was living with and whether or

not since her husband was arrested she had not been living with another witness in the case. Upon objection by counsel for the prosecution, the evidence was not admitted. The Supreme Court in reversing the conviction because of the error in refusing to allow the questions to be asked stated:

> "We think answers to all of these questions should have been permitted. *The questions were directed to the purpose of showing material facts bearing upon the character and credibility of the witness, and the counsel for the defendant ought to have been permitted to proceed with his examination and obtain answers from the witness to that end.*"

In ALFORD vs. U. S. 75 Law Ed. 624, 282 U. S. 687, it was held that a witness for the prosecution who has testified to uncorroborated conversations of defendant of a damaging character, may properly be asked on cross examination, "Where do you live?", even though the purpose of the inquiry is to point out the fact that he is in court in the custody of the federal authorities, as such circumstance has a bearing on the question of bias; further that the denial of reasonable latitude in cross examination is prejudicial error; and it is not necessary to show that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief. In reversing the conviction, our supreme court stated:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. KNAPP v. WING, 72 Vt. 334, 340, 47 Atl. 1075; *Martin v. Elden*, 32 Ohio St. 282,

289. It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. *Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appriase them.* TLA-KOO-YEL-LEE v. UNITED STATES, 167 U. S. 274, 42 L. ed. 166, 17 S. Ct. 855, supra; KING v. UNITED STATES, 50 (CCA) 647, 112 Fed. 988, supra; PEOPLE v. MOORE, 96 App. Div. 56, 89 N. Y. Supp. 83, affirmed without opinion in 181 N. Y. 524, 72 N. E. 1129; cf. PEOPLE v. BECKER, 210 N. Y. 274, 104 N. E. 396. To say what prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. . .

The extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. (citing cases).

But no obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination short of an attempted invasion of his constitutional protection from self-incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him. THIRD GREAT WESTERN TURNP. ROAD CO. v. LOOMIS, 32 N. Y. 127. 132, 88 Am. Dec. 311; WALLACE v. STATE, 41 Fla. 547, 574ff., 26 So. 713, supra; 5 Jones, Ev. 2d ed. Sec. 2316. But no such case is presented here. The trial court cut off in limine all inquiry on a subject with respect to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and prejudicial error."

In PULLMAN COMPANY v. HALL, 55 Fed. (2d) 139 (CCA 4) it was held that for the purpose of impeaching credibility, a witness may be questioned as to misconduct respecting collateral matters which has a tendency to show lack of honesty or truthfulness, but the party questioning is bound by the answers. In discussing this point, the court stated:

> "We come then to the third question. Plaintiff testified as a witness in her own behalf; and on her cross-examination counsel for defendant proposed to question her as to her having sworn falsely in the affidavit filed as a basis for proceeding in forma pauperis. Upon objection of plaintiff's counsel, these questions were excluded. In this there was error. The proposed questions related to a matter connected with the very case on trial which undoubtedly affected plaintiff's credibility as a witness. *The matter as to which inquiry was proposed was collateral to the issue on trial, and for that reason extrinsic evidence would not have been competent to establish it or to contradict plaintiff's testimony with regard thereto, but it was competent, on cross-examination of plaintiff, to question her with regard to it. The rule is that for the purpose of impeaching the credibility of a witness he may be questioned as to misconduct, even as to collateral matters, which has a tendency to show his lack of honesty or truthfulness;* the qualification of the rule being that the party questioning him is bound by his answers and may not contradict him with regard thereto. See Wigmore on Evidence (2d Ed.) vol. 2, Sec. 982 et seq.; Greenleaf on Evidence, Lewis' edition, Sec. 459; 28 R. C. L. 607; TLA-KOO-YEL-LEE v. U. S., 167 U. S. 274, 277, 17 S. Ct. 855, 42 L. Ed. 166. It is said that it was within the discretion of the trial judge whether questions would be permitted as to acts of misconduct affecting credibility. *We think, however, that the matter resting within the discretion of the judge is merely the extent to which such examination may be pursued. To refuse*

*the right to examine at all with respect to such matters is reversible error.* TLA-KOO-YEL-LEE v. U. S., supra; ALFORD v. U. S., 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624; 28 R. C. L. 609.

For the reasons stated, the judgment below will be reversed, and the cause will be remanded for a new trial."

In SIMON v. U. S. 123 Fed. (2d) 80 (CCA 4), it was held that in criminal cases in federal courts, credibility of a defendant who has testified may be impeached in the same manner and to the same extent as any other witness, but no further, and cross-examination for impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so pertain to his personal turpitude, as to indicate moral depravity or degeneracy that would likely render him insensible to the obligations of oath. In discussing this point, the court stated:

". . . questions asked on cross-examination for the purposes of impeachment should be confined to acts or conduct which reflect upon his integrity or truthfulness, or so 'pertain to his personal turpitude, such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to the obligations of an oath to speak the truth' (citing case); when such a question is asked and answered, the inquiry is ended; the government is bound by the answer in that it may not, on rebuttal, offer countervailing proof (citing cases)."

In CHRISTOPOULO v. U. S. 230 Fed. 788 (CCA 4), it was held that in the prosecution for falsely representing himself to be a citizen of the United States, defendant, who took the stand in his own behalf may be required to answer whether he ran a "blind tiger" when the court charges that

his answer can be considered, not as evidence of guilt, but only as affecting, in so far as it involved moral delinquency, his credibility as a witness. The court stated at page 791:

> "The only remaining assignment that needs to be noticed relates to a question of evidence. The defendant was a witness in his own behalf and was asked on cross-examination if he ran a "blind tiger" which implied that he sold liquor unlawfuly. The question was allowed over his objection and he was required to answer. In charging the jury the trial court made it plain that this evidence was admitted, not as tending in any wise to prove the offense for which defendant was on trial, but solely, in so far as it involved moral delinquency, as affecting his credibility. For this purpose, to which it was explicitly limited, the evidence was admissible, as this court had recently held in FIELDS v. UNITED STATES, 221 Fed. 242, 137 CCA 98."

In PORT WELLS MILL & LUMBER COMPANY v. CRAWFORD, 264 Fed. 935 (CCA 9), it was held that the admission in evidence of the record in another action for the purpose of discrediting a witness was not prejudicial error even though the records in this action were made up by the party's attorney, since they were binding upon him and could be used to discredit him. The Ninth Circuit Court stated at page 938:

> "The first assignment of error relates to the admission by the court, over objection of plaintiff's counsel, of certain court records in the case of GEORGE LACY ET AL. v. H. E. ELLIS. The record was introduced for the purpose of discrediting Ellis, who had been called by plaintiff, and was at the time under cross-examination. Ellis being a party to that case, his attention was called to a certain statement accompanying the record, and he was asked whether it was correct, and answered

that he did not believe the statement to be correct. Primarily the record did have a tendency to discredit the witness and was relevant for the purpose, and was properly admitted. Although Ellis' attorney made up the records in the case, they were nevertheless such as Ellis was responsible for, and were binding upon him, and were such as could be properly used to discredit him respecting his testimony given in his examination in chief."

In U. S. v. BUCKNER, 108 Fed. (2nd) 921, (CCA 2) it was held that cross examination of accused concerning circumstances surrounding his resignation from the bar was proper as affecting credibility, the court stating:

"We do not regard this procedure as improper. It would have been permissible, as bearing on the credibility of the witness, to ask him whether he had been disbarred. PEOPLE v. DORTHY, 156 N. Y. 237, 50 N. E. 800. Questions regarding resignation under fire, together with an admission of inability to make a successful defense against charges of professional misconduct, imply very much the same sort of immoral acts as does disbarment, and should be similarly admissible to affect credibility."

In 58 AM. JUR. 346, Witnesses Sec. 625, it is stated:

"Cross-examination with a view to direct impeachment is not the limit of the right. While it is not allowable to a counsel on cross-examination to put a question to a witness concerning any distinct collateral fact, not relevant to the issue, for the purpose of disproving the truth of the expected answer by other witnesses, a witness may be cross-examined as to irrelevant matters in order to discredit his testimony by what he himself may state in answer. In fact, this line of inquiry is the principal factor in establishing cross-examination as one of the chief agencies for the development of the truth in judicial inquiries. By means thereof the relation of

the witness to the cause of the parties, his bias or interest, if he has any, his character for truth and veracity indeed any collateral fact which may bear on his truthfulness and impartiality, may be brought to light. Any question, although irrelevant or remote, may be put if it reasonably tends to explain, contradict, or discredit any testimony given by him, or to test his accuracy, memory, veracity or credibility."

In 7 CYC. of FED. PROC. 86 Section 3131, it is stated:

"The courts have not hesitated to discredit witnesses whose unworthiness of belief is apparent by reason of their character and conduct. The manner of making it so appear is another matter. It has been the rule for a long time that the witness may be discredited by showing upon cross-examination collateral matters which detract from his character and moral principles in a manner bearing upon his worthiness to be believed. In this way the illegal character of a witness' occupation or associations may be shown as bearing on the question of this credibility, but it cannot be done except upon cross-examination of him; and, when such matters are gone into on cross-examination, the answer of the witness is conclusive and not open to rebuttal."

It is submitted that the above cases are conclusive upon the prejudicial limitation of appellant's cross examination of the witness, Mrs. Elaine Elliot.

III.

THE IDENTITY OF ONE TEX REED WAS PREJUDICIAL THE CROSS EXAMINATION OF APPELLANT AS TO

The United States attorney in his cross examination of the appellant was permitted to ask and the appellant was required to answer over objections questions as to the identity of one Tex Reed (R. 252, 253). Reed, although

subpoenaed by the Government, was not called as a witness during the entire case. The name of Reed was mentioned only incidentally in the direct examination of the appellant and all other reference to this individual was a part of the government's case-in-chief. The only obvious purpose of the examination of appellant concerning the identity of this witness was to establish "guilt by association" as the questions asked certainly by inuendo and directly for that matter, indicated that this person was engaged in the business of prostitution. This evidence, of course, would obviously tend to create prejudice in the minds of the jury against the appellant and certainly prevented the jury from considering the evidence adduced in the case in a fair and impartial manner.

In HOCKADAY vs. RED LINE, INC., 174 Fed. (2d) 154 (CCA, D. C.), it was held that cross examination of the plaintiff in a personal injury action to show that he had not served in the military forces although suspension of a sentence for assault was conditioned upon such service and reference to such fact in defense counsel's argument to the jury deprived plaintiff of a fair trial and constituted reversible error. In discussing this point, the court stated:

> "Surely such a statement was not pertinent to any issue in this case, even to the question of the credibility of the plaintiff. It was designed to becloud the real issues in the case and to focus the jury's attention on something which was immaterial and which was prejudicial to the plaintiff. We are of the opinion that no useful purpose was served by exposing to the jury the fact that this plaintiff had failed to enter the armed forces

of the United States, and much harm to the plaintiff naturally followed such disclosure."

In WILSON v. U. S., 4 Fed. (2d) 888 (CCA 8), it was held that although the government is not confined in cross examination of a defendant to a mere categorical reiteration of her testimony in chief, cross examination wholly outside her examination in chief, and making her give self-incriminating testimony was not permissible and was in fact, reversible error.

The questions asked the appellant on his cross examination by the United States attorney concerned no matter of proof and as stated above, merely served to prejudice the jury against the appellant.

## IV.

## IT WAS ERROR TO ADMIT THE TESTIMONY OF THE WITNESS, WORSHAM, CONCERNING ALLEGED ADMISSIONS OF THE APPELLANT

John W. Worsham, an agent of the Federal Bureau of Investigation, interrogated the appellant on March 6, 1950, and testified concerning certain alleged admissions made by the appellant at the time of the conversation (R. 137, 138). The appellant was not arrested until March 9, 1950, some three days after this conversation (R. 141). It does not appear in the record when the appellant was taken before a United States Commissioner but, it is, of course, obvious that it had to be after his arrest on March 9th. It is the position of the appellant that the admitting of these alleged

admissions was prejudicial error in view of he fact that they occurred prior to a hearing before the United States Court Commissioner and prior to his arrest.

Fed. Rules Cr. Proc., Rule 5, 18 U. S. C. A., provides that upon a party's arrest he shall have a hearing before a United States Commissioner without unnecessary delay. In both McNABB v. U. S., 87 Law Ed. 19, 318 U. S. 332 and ANDERSON v. U. S., 87 Law Ed. 829, 318, U. S. 350, it was held that confessions obtained before the defendant was taken before a United States Commissioner and which confessions were not voluntary, could not be introduced as evidence on the trial and the considerations of justice required the setting aside of convictions obtained by incriminating statements not voluntarily given.

In interpreting the McNabb and Anderson cases, it was held in U. S. v. HAUPT, 136 Fed. (2d) 661 (CCA 7) that statements taken from defendants by officers of the F. B. I. before defendants had been taken before a committing officer as required by the statute were inadmissible.

In U. S. v. HOFFMAN, 137 Fed. (2d) 416 (CCA 2), defendant was being prosecuted for failure to report for induction into the Army and statements were taken from him after his arrest but before his arraignment. It was held that even voluntary statements made by the defendant after his arrest and before araignment were not admissible against him, the court stating:

"Next we must consider the statements given the F. B. I.

Defendant was arrested by F. B. I. agents on December 23 and taken to the Federal Building in Brooklyn, where he was questioned by Mr. De Meo, the government prosecutor in this case. At that time he signed a statement, witnessed by Mr. Walsh, the F. B. I. agent who testified. He gave another statement on December 24, with an addendum on December 26, both from the Federal House of Detention in New York City. Whether these were made before his arraignment is not clear. Mr. Walsh testified that immediately upon his apprehension, defendant was brought before Mr. De Meo, "and there (then?) was again questioned by Mr. De Meo, and was later arraigned" before the United States Commissioner. Whether "later" was a matter of hours or days does not appear. The facts that the Commissioner allowed his release on moderate bail and that he was still in detention when ever the later statements were given suggest that all preceded arraignment. If so, they were not admissible against him under the cases of McNabb v. United States, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed , and Anderson v. United States, 318 U. S. 350, 63 S. Ct. 599, 87 L. Ed. , both decided March 1, 1943, and United States vs. Haupt et al., 7 Cir., 136 F. (2d) 661, decided June 29, 1943. These cases appear to make it clear that even the voluntary character of statements prior to arraignment does not make them admissible. See Proposed Federal Rules of Criminal Procedure, Rule 5, and Committee Note thereto."

## V.

## APPELLANT'S TESTIMONY AS TO HIS NEED OF PSYCHIATRIC AND OTHER MEDICAL TREATMENT SHOULD HAVE BEEN ADMITTED

In appellant's direct examination, testimony was offered as to his having taken medical and psychiatric treatment during the time of the alleged offenses which treatment was necessitated and caused by appellant's wounds

received during the war and his service in the Burma Theater. While it is not our contention that appellant was insane and the evidence offered would not have needed to prove insanity, yet it is submitted that the testimony would have thrown some light, as far as the jury was concerned, upon appellant's peculiar acts which the average person simply could not understand. The acts we specifically refer to are his going to Tacoma to send a money order to Mrs. Elliot's room mate, Marge Mahoney, and his taking a receipt in the name of Tom Chambers. Also his use of various aliases in registering both himself and Mrs. Elliot at various hotels and auto courts. This evidence of his warped state of mind it is submitted also is important generally for the jury's consideration as to whether or not appellant had formed an intent, plan or purpose to violate the act in question prior to Mrs. Elliot's arrival in the State of Washington.

In 22 C. J. S. 933 it is stated in Section 613 under "Inclination or Intent to Commit," that:

> ". . . when it becomes material to show the particular intent which inspired an act, any fact or circumstance which proves or tends to prove such intent, or which proves or tends to prove want of such intent is admissible."

In NARCOTT v. U. S., 65 Fed. (2d) 913, (CAA 7), defendant was indicted being charged with using the mails in executing a fraudulent scheme to sell securities. It was held that circumstantial evidence which reasonably throws

light upon defendant's intention either directly or indirectly, is admissible in prosecution for using mails to defraud. In this connection, the court stated:

> "The intention of the appellants is a most vital element in this cause. They are the only ones who have absolute knowledge concerning that subject. Their evidence, of course, is to be weighed as other evidence, but on account of their intense interest their statements as to their intention are to be considered with great caution. For this reason circumstantial evidence, as in all such cases, must play an important part in the determination of that fact, and all circumstances which reasonably throw light upon that subject, either directly or indirectly, should be received in evidence on behalf of both the Government and those charged with crime. See Wood vs. United States, 16 Pet. (41 U. S.) 342, 10 L. Ed. 987. Such evidence is not only quite important to the jury in the determination of guilt, but it is equally important to the court in the imposition of penalty."

See also PEOPLE vs. MOONEY, 171 Pac. 690 (Cal.).

## VI.

## THE COURT ERRED IN REFUSING TO GIVE APPELLANT'S REQUESTED INSTRUCTIONS 9, 11 AND 16

Appellant's requested instruction number 9 would have instructed the jury upon the necessity of their determining that appellant had formed the necessary intent to violate the statute prior to Mrs. Elliot's reaching the State of Washington. This particular point was not covered in the court's instructions as the only instruction concerning intent with reference to the transportation was as follows:

"An intention that the woman shall engage in the con-

duct outlawed must be found to exist at the time the transportation took place, and must be the dominant motive of such interstate movements . . ." (R. 263).

The proposed instruction in essence followed the language of the United States Supreme Court in MORTENSON v. U. S., 88 L. Ed. 1331, 322 U. S. 369, cited supra, and we again quote the court's language upon the time of formation of the intent:

"An intention that the woman or girl shall engage in the conduct outlawed by Section 2 must be found to exist before the conclusion of the interstate journey . . ."

While it is true the court's instruction generally followed the Mortenson case upon this very important point, it was not specifically stated that the intention must be found to exist before the conclusion of the journey but merely that the intention must be found to exist at the time the transportation took place.

In ALPERT v. U. S., 12 Fed. (2d) 352 (CCA 2), cited supra, the court stated and we again quote:

"To justify conviction, there should be evidence of the intention to transport the woman for immoral purposes, and that it was formed before the woman reached the state to which she was being transported."

In SLOAN v. U. S., 287 Fed. 91 (CCA 8), it was stated:

"Therefore, in order to constitute the offense charged, there must be substantial evidence that the intention to transport the woman for immoral purposes must have been formed by the parties before they reached the foreign state, to which the woman is being transported. If it did not exist then, but was only formed

> after reaching the state in which the immorality is committed, it is clearly insufficient to warrant a conviction under the act."

From the above citations, it is submitted that the court did not properly charge the jury upon the time of the formation of the intent and the jury could have determined that the intent was formed while the transportation was taking place and Mrs. Elliot was actually traveling within the boundaries of the State of Washington.

Proposed instruction number 11 placed before the jury the fact that a mere expectation upon the part of the appellant that he would perhaps have immoral relations with Mrs. Elliot was not sufficient and the further fact that an actual seriously made plan upon the part of the appellant was necessary.

In ALPERT v. U. S., 12 Fed. (2d) 352 (CCA 2), cited supra, the necessity of an arrangement or plan is emphasized and again in WELCH v. U. S., 220 Fed. 764 (CCA 4), it is stated:

> "It appears to us an untenable proposition, when this girl went back home for a legitimate and commendable reason, because of information coming to her which was of itself ample cause and explanation of her return, that the defendant can be held to have committed the offense of which he was found guilty merely because he might have had the secret desire or intention of using her there for the gratification of his passion, although he had nothing whatever to do with her going back which was not entirely suitable and proper."

Particularly with reference to the second trip of Mrs.

Elliot this instruction was applicable and should have been given because undoubtedly the immoral relations indulged in by the parties upon Mrs. Elliot's arrival in Seattle were only incidental to her trip and the record is devoid of any inference that the purpose of appellant's bringing Mrs. Elliot out was primarily to have such relations with her. It was entirely incidental and if anything existed in the mind of the appellant concerning this phase of the case, it was merely an expectation or secret desire.

Proposed instruction number 16 covers the question of the necessity that the unlawful purpose be the primary purpose and not the secondary or incidental purpose of the trip.

In YODER v. U. S., 80 Fed. (2d) 665 (CCA 10), cited supra, this point is covered and the court therein emphasized the necessity that if the sole purpose was legitimate, it does not violate the statute. We again quote from that case:

> ". . . but if the sole purpose of the trip is legitimate, a purely incidental intent to have intercourse is not a federal offense."

The failure to give the above instructions was prejudicial to the appellant as such failure resulted in the jury's not being charged concerning the very material points covered by such instructions.

## VII.

## THE READING OF THE TESTIMONY OF THE WITNESS, BETTY DesCORREAU, IN QUESTION AND ANSWER FORM IN THE UNITED STATES ATTORNEY'S CLOSING ARGUMENT WAS PREJUDICIAL

The United States attorney in his closing argument read to the jury in question and answer form the testimony of the witness, Betty DesCorreau (R. 256, 257, 258). It is, as heretofore stated, the contention of the appellant that this action on the part of the counsel was prejudicial to the appellant's having a fair trial due to the fact that it unduly emphasized the testimony of this witness and the practical effect of it was to permit this witness to testify twice before the jury. The nature of the testimony itself, the very apparent bias and prejudice of this witness when coupled with the reading of her testimony in argument clearly prevented the jury from weighing this witness' testimony in its proper perspective. We admit that the permitting of such action by the trial court is a matter within the court's discretion in the ordinary case but in view of the nature of the testimony of this witness, it is submitted that in this instance it was clearly an abuse of discretion.

In conclusion the judgment and conviction and sentence which was entered by the District Court should be

reversed or in the alternative, the appellant should be granted a new trial.

Respectfully submitted,

HARRY L. OLSON,
FREDERICK C. PALMER,
JOHN WM. McARDLE.
302 Miller Building
Yakima, Washington
*Attorneys for Appellant.*